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PTO/SB/31 (04-05)
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U.S. Patent and Trademark Office; U.S. DEPARTMENT OF COMMERCE

NOTICE OF APPEAL FROM THE EXAMINER TO THE BOARD OF PATENT APPEALS AND INTERFERENCES

Docket Number (Optional): JP919990263US1

I hereby certify that this correspondence is being facsimile transmitted to the USPTO or deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to "Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450" [37 CFR 1.8(a)] on October 29, 2007

Signature: Anne Vachon Dougherty

Typed or printed name: Anne Vachon Dougherty

In re Application of: N. Feng

Application Number	Filed
09/772,011	01/27/2001

For: METHOD FOR BALANCING SERVERS ..

Art Unit	Examiner
2145	A.Q. Choudhury

Applicant hereby **appeals** to the Board of Patent Appeals and Interferences from the last decision of the examiner.

The fee for this Notice of Appeal is (37 CFR 41.20(b)(1)) $ 510.00

- ☐ Applicant claims small entity status. See 37 CFR 1.27. Therefore, the fee shown above is reduced by half, and the resulting fee is: $ _____
- ☐ A check in the amount of the fee is enclosed.
- ☐ Payment by credit card. Form PTO-2038 is attached.
- ☐ The Director has already been authorized to charge fees in this application to a Deposit Account. I have enclosed a duplicate copy of this sheet.
- ☒ The Director is hereby authorized to charge any fees which may be required, or credit any overpayment to Deposit Account No. 50-0510 . I have enclosed a duplicate copy of this sheet.
- ☐ A petition for an extension of time under 37 CFR 1.136(a) (PTO/SB/22) is enclosed.

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I am the

- ☐ applicant/inventor.
- ☐ assignee of record of the entire interest. See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed. (Form PTO/SB/96)
- ☒ attorney or agent of record. Registration number 30,374
- ☐ attorney or agent acting under 37 CFR 1.34. Registration number if acting under 37 CFR 1.34. _____

Anne Vachon Dougherty
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October 29, 2007
Date

NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below*.

☒ *Total of 1 forms are submitted.

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The claims recite a system, method, and program storage device for dynamically providing load balancing among a plurality of mirror servers during a user session with a web site. When a user at a client machine contacts a web site, the web page and a predetermined script are transmitted to the client. The predetermined script is automatically executed at the client to establish connections with each of the plurality of mirror servers associated with the web page that are available to serve the client's request. As the connections are established between the client and each of the mirror servers, the response times are measured. The client selects the mirror server with the most favorable response time as the selected mirror server to handle the user's next request during that session. The "load balancing" is done at the client location by evaluating the response times. The user's next action during that session will be sent to the mirror server selected as the fastest. Accordingly, the present invention provides client-side "load balancing" by selecting the fastest server and sending the next request/action in the user session to that selected server.

The claims have been rejected as unpatentable over the Kenner patent. The Kenner patent is directed to server-side optimization of data delivery on a distributed computer network. Kenner provides a plurality of mirror servers, each of which is capable of responding to a client's request for data delivery. Each client is provided with software which includes a configuration utility and a client program. "The configuration utility is used first to determine which delivery sites provide improved performance for that particular user" (Col. 5, lines 39-43). Tests are run and the test results are provided to

the service provider's database (Col. 5, lines 57-60). Thereafter the delivery site chosen by the server configuration utility is used for all requests and sessions by that user for the retrieval of content managed by the delivery system service provider (Col. 5, lines 61-63). Kenner teaches that a server selection is made in advance as to which delivery site/mirror server will handle a client's requests. The determination is made prior to the client making any requests. Kenner expressly states that "the configuration utility 34 must be run by the user...before the user terminal 12 will have access to the system" (Col. 8, lines 37-41). Clearly Kenner is neither teaching nor suggesting that a server be dynamically selected by the client during a session to handle the next action within that session. Kenner does not teach that the determination is made in response to the client accessing the web page. Rather, Kenner's client must execute the configuration utility prior to joining the system and prior to issuing any client requests.

Applicants further note that Kenner does not teach or suggest that the configuration utility be downloaded upon access to a web site in response to a user request to browse that web site. Rather, Kenner requires that the configuration utility be run *before* the user terminal will have access to the system (Col. 8, lines 37-41). While Kenner does teach that the configuration utility can be downloaded from the MSP server, Kenner neither teaches nor suggests that the configuration utility be downloaded for each session upon access to a web site in response to a user request to browse the web site.

Applicants respectfully assert that the Kenner patent does not obviate the invention as claimed. As is expressly

recited in the independent claims, the present invention provides steps and means for transmitting the web page and the predetermined script "when said web page is accessed by a client in response to user input to establish a session" (Claims 1-10 and 20) and "in response to user input to establish a session to browse said web site" (Claims 11-19). Further, the claims recite selecting a mirror server to handle the next user action during the session. Kenner does not teach or suggest the claim features.

For a determination of obviousness, the prior art must teach or suggest all of the claim limitations. "All words in a claim must be considered in judging the patentability of that claim against the prior art" (In re Wilson, 424 F. 2d 1382, 1385, 165 U.S.P.Q. 494, 496 (C.C.P.A. 1970). If the cited references fail to teach each and every one of the claim limitations, a *prima facie* case of obviousness has not been established by the Examiner. Since Kenner does not teach steps and means for transmitting the web page and the predetermined script "when said web page is accessed by a client in response to user input to establish a session" (Claims 1, 3-10 and 20) and "in response to user input to establish a session to browse said web site" (Claims 11-19), and does not teach selecting a mirror server to handle the next user action during the session (Claims 1 and 3-20), it cannot be maintained that the claims are unpatentable over Kenner.

The Examiner has taken "official notice" of the fact that software can be downloaded through HTTP in a network. However, Applicants maintain that, even if one having skill in the art sought to modify Kenner by downloading software, the modified Kenner system would still not obviate the present invention since there is no teaching or suggestion

of downloading software in a session to execute the software for a client to select a server to handle the next request in the session.

The Examiner has made conclusory statements about Kenner which are not supported by the Kenner teachings. For example, the Examiner states that "a browser can be directed to the MSP and a software can be downloaded through a webpage interface"-but Kenner doesn't teach that. Further the Examiner concludes that "[m]odern processors and operating systems enable multithreaded execution", however Kenner does not teach or suggest multithreaded execution of a script within a session to select a server to handle the next action in that session.

Applicants contend that obviousness cannot be maintained without some teaching or suggestion of the claim features. The Federal Circuit has stated that when patentability turns on the question of obviousness, the obviousness determination "must be based on objective evidence of record" and that "this precedent has been reinforced in myriad decisions, and cannot be dispensed with." (In re Lee, 277 F. 3d 1338, 1343 (Fed. Cir. 2002)). The Federal Circuit has stated that "conclusory statements" by an examiner fail to adequately address the factual question of motivation, which is material to patentability and cannot be resolved "on subjective belief and unknown authority" (Id. at 1343-1344). Accordingly, Applicants maintain that the Examiner has not established that the pending claims are *prima facie* obvious.